Supreme Court, U.S.
FILED
JUL 1 1996
CLERK

(13)

No. 95-1065

In the Supreme Court of the United States

OCTOBER TERM, 1995

PAUL SCHENCK AND DWIGHT SAUNDERS, PETITIONERS

v.

PRO-CHOICE NETWORK OF WESTERN NEW YORK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

WALTER DELLINGER
Acting Solicitor General
DEVAL L. PATRICK
Assistant Attorney General
PAUL BENDER
Deputy Solicitor General
BETH S. BRINKMANN
Assistant to the Solicitor General
JESSICA DUNSAY SILVER
SAMUEL R. BAGENSTOS
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

35 pp

QUESTION PRESENTED

This case concerns constitutional challenges to two provisions of an injunction prohibiting unlawful obstruction of and interference with access to certain health care clinics at which abortions are performed. The first challenged provision states that petitioners, and others acting in concert with them, may not demonstrate within 15 feet of entrances to respondents' health care clinics, or within 15 feet of persons and vehicles seeking access to or leaving such clinics, except that they may engage in "sidewalk counseling," *i.e.*, nonthreatening individual conversations, by no more than two counselors, with persons entering or leaving a clinic. The second challenged provision states that, in the event that a person who is the object of sidewalk counseling expresses a desire to end the encounter, the counselors must either cease counseling or move at least 15 feet away.

The question presented is:

Whether the injunction provisions challenged by petitioners violate the First Amendment.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	14
Argument	16
The challenged provisions of the preliminary injunction serve significant government interests and burden no more speech than necessary	18
A. The prohibition against petitioners demonstrating within 15 feet of clinic entrances, or within 15 feet of vehicles and persons seeking access to or leaving the clinics, furthers significant government interests	18
B. The prohibition against petitioners demonstrating within 15 feet of clinic entrances, or within 15 feet of vehicles and persons seeking access to or leaving the clinics, burdens no more speech than necessary	24
C. The provision requiring that sidewalk counselors move away from a person, to a distance of 15 feet, if the person requests, does not burden more speech than necessary	27
Conclusion	30

TABLE OF AUTHORITIES

Cases:

Boos v. *Barry*, 485 U.S. 312 (1988)	27
Bray v. *Alexandria Women's Health Clinic*, 506 U.S. 263 (1993)	11, 19
Cameron v. *Johnson*, 390 U.S. 611 (1968)	21

Cases—Continued: Page

Carroll v. *President & Comm'rs of Princess Anne*, 393 U.S. 175 (1968) 25
Chicago Teachers Union, Local No. 1 v. *Hudson*, 475 U.S. 292 (1986) 17
Chevron U.S.A. Inc. v. *Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984) 17
Cohen v. *California*, 403 U.S. 15 (1971) 27
Cox v. *Louisiana*, 379 U.S. 536 (1965) 21
Cox v. *New Hampshire*, 312 U.S. 569 (1941) 21
Erznoznik v. *City of Jacksonville*, 422 U.S. 205 (1975) 27
Grayned v. *City of Rockford*, 408 U.S. 104 (1972) ... 24
Heffron v. *ISKCON*, 452 U.S. 640 (1981) 21
Hustler Magazine, Inc. v. *Falwell*, 485 U.S. 46 (1988) 27
ISKCON v. *Lee*, 505 U.S. 672 (1992) 27
Kovacs v. *Cooper*, 336 U.S. 77 (1949) 27
Madsen v. *Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994) ..... *passim*
McComb v. *Jacksonville Paper Co.*, 336 U.S. 187 (1949) 23
Medlin v. *Palmer*, 874 F.2d 1085 (5th Cir. 1989) 21
Meyer v. *Grant*, 486 U.S. 414 (1988) 24
Milk Wagon Drivers Union v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287 (1941) 22
National Soc'y of Professional Engineers v. *United States*, 435 U.S. 679 (1978) 22
NLRB v. *Baptist Hospital, Inc.*, 442 U.S. 773 (1979) 21
Pro-Choice Network v. *Project Rescue*, 828 F. Supp. 1018 (W.D.N.Y. 1993) 11, 12, 22
Roe v. *Wade*, 410 U.S. 113 (1973) 21
Rowan v. *United States Post Office Dept.*, 397 U.S. 728 (1970) 10, 27
Schneider v. *State*, 308 U.S. 147 (1939) 21, 27

Cases—Continued: Page

Slovenec, In re, 799 F. Supp. 1441 (W.D.N.Y. 1992) .. 22
Taylor v. *Freeland & Kronz*, 503 U.S. 638 (1992) 19
Texas v. *Johnson*, 491 U.S. 397 (1989) 27
Yee v. *City of Escondido*, 503 U.S. 519 (1992) 19

Constitution and statutes:

U.S. Const. Amend. I (Free Speech Clause) 2, 14, 16
Freedom of Access to Clinic Entrances Act of 1964, Pub. L. No. 103-259, 198 Stat. 694 (18 U.S.C. 248) 2, 20
18 U.S.C. 248(a)(1) 2, 20
18 U.S.C. 248(c) 2
18 U.S.C. 248(c)(1) 20
18 U.S.C. 248(c)(2) 20
18 U.S.C. 248(c)(3) 20
42 U.S.C. 1985(3) 3, 11, 19
N.Y. Civ. Rights Law § 40-c (McKinney 1992) 3
N.Y. Exec. Law § 296 (McKinney 1982 & 1990) 3

Miscellaneous:

Note, *Too Close For Comfort: Protesting Outside Medical Facilities*, 101 Harv. L. Rev. 1856 (1988) 28

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1065

PAUL SCHENCK AND DWIGHT SAUNDERS, PETITIONERS

v.

PRO-CHOICE NETWORK OF
WESTERN NEW YORK, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

This case arises out of an action brought by respondents, health care clinics and physicians who provide gynecological services, including abortion services. A federal district court issued an injunction against petitioners and others who had engaged in, and threatened to engage in, wrongs to respondents, including impeding clinic patients and employees from entering the clinic, and intimidating and harassing clinic patients and employees as they arrived at and departed from the clinics. A panel of the court of appeals upheld certain portions of the injunc-

tion, but held two provisions unconstitutional. The court of appeals, sitting in banc, vacated the portion of the panel opinion striking down the two provisions, and held them valid, as modified.

Petitioners maintain that the two provisions violate their First Amendment rights. The Court's resolution of the constitutionality of these injunction provisions could affect the scope of injunctive relief available under the Freedom of Access to Clinic Entrances Act, 18 U.S.C. 248 (Access Act), which prohibits, *inter alia*, individuals, through force, threat of force, or by physical obstruction, from intimidating or interfering with any person because that person is, or has been, obtaining or providing reproductive health services. 18 U.S.C. 248(a)(1). The Attorney General has primary responsibility for enforcing the Access Act and injunctive relief is specified as a remedy available under the Act. 18 U.S.C. 248(c).

In addition, the instant case constitutes the first review by this Court of a decision applying the standard established by the Court in *Madsen* v. *Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994), for determining the constitutionality of injunctions that are challenged on First Amendment grounds. The United States participated as amicus curiae in *Madsen* in light of its interest in seeing that adequate judicial relief is available against those who illegally impede access to medical clinics providing abortion-related services, and its interest in preserving the ability of its citizens to exercise their First Amendment rights in a manner compatible with the rights of others. The same interests support the United States' participation in the instant case.

STATEMENT

1. a. Respondents include physicians, medical centers, and other health care providers, located in western New

York State, that offer family planning and gynecological services, including abortion services, at their health care clinics. Pet. App. A5.[1] Respondents filed this suit against petitioners Rev. Paul Schenck and Dwight Saunders, as well as Project Rescue Western New York, Operation Rescue, Project Life of Rochester, and approximately 50 other individuals who had "engaged in a consistent pattern of illegal conduct at [respondents'] health care facilities including blockading access to and egress from their facilities, trespassing, and harassment and intimidation of patients and staff." *Id.* at A5, A141.[2] Respondents brought six state law claims against petitioners, including tortious interference with business, trespass, intentional infliction of emotional harm, tortious harassment, false imprisonment, and violation of N.Y. Civ. Rights Law § 40-c (McKinney 1992) and N.Y. Exec. Law § 296 (McKinney 1982 & Supp. 1990), as well as one federal law claim, alleging a conspiracy to deprive women seeking abortions of the equal protection of the laws and the equal privileges and immunities of citizenship, in violation of 42 U.S.C. 1985(3).

---

[1] The Respondent health care providers include Buffalo GYN Womenservices, P.C.; Erie Medical Center; Paul Davis, M.D.; Shalom Press, M.D.; Barnett Slepian, M.D.; Morris Wortman, M.D.; Highland Obstetrical Group; and Alexander Women's Group. Pet. App. A5. Respondent Pro-Choice Network of Western New York is a not-for-profit organization, based in Buffalo, New York, that is dedicated to maintaining legal and safe access to family planning and abortion services in western New York State. *Ibid.*

[2] Petitioners Paul Schenck and Dwight Saunders are the only named defendants who filed a petition for a writ of certiorari. All of the defendants stipulated below, however, that any unlawful conduct found to have been performed by any of them could be attributed to all of them for purposes of the preliminary injunction. Pet. App. A136; Transcript of Preliminary Injunction Hearing, March - April, 1991 (Tr.) 5-7, 919-920. Accordingly, we use the term "petitioners" to refer to all the named defendants collectively.

Pet. App. A141-A142. The court entered a temporary restraining order (TRO) and, ultimately, the preliminary injunction at issue here.

The court's preliminary injunction was based on detailed findings of fact and conclusions of law, and supported by record evidence, including the following: Petitioners' most obstructive conduct involved full-scale, physical blockades of respondents' clinics. Pet. App. A145-A146. During a full-scale blockade, a large number of demonstrators "trespass on the clinic property and sit or lay in the entrance of the clinic in an attempt to block access to and egress from the clinic." *Id.* at 146. Many demonstrators "lock arms or chain themselves together in order to make it more difficult for police to remove them." *Ibid.* Respondents' clinics were often the victims of such blockades by petitioners. "On many of those occasions, the operation of the targeted facility was effectively stopped or significantly hampered." *Ibid.*; Tr. 8, 437.

Petitioners conducted demonstrations, at other times, that fell short of full-scale blockades but, nonetheless, significantly obstructed and impeded access to respondents' facilities, including "demonstrating and picketing around the entrances of clinics," and "harassing patients and staff entering and leaving the clinics" on days when abortions were scheduled to be performed. See Pet. App. A146-A147. Petitioners would "frequently and routinely congregate in or near the driveway entrances to the facility parking lots in order to impede and obstruct access to the facilities." *Id.* at A147; see also Tr. 171, 173, 185-186, 276-277, 343-344, 894-895. The large number of demonstrators made it difficult for people seeking access to the clinics to find the driveway and the entrances, intimidated drivers, and created danger to occupants of the approaching cars and to demonstrators. See Pet. App. A147; Tr. 187-190, 344-346, 352-356. Some vehicles simply "could not

get in" the clinic driveways because the demonstrators stood in their way. Tr. 191, 221, 393. Demonstrators "would almost invite somebody to hit them or pretend that they had been hit," by dropping to their knees in front of a car, or by "falling on top of the hood of the car." Tr. 83, 89-93, 185-186, 190, 343. As a result, some patients were forced to delay their appointments, causing increased risks to their health. Pet. App. A147, A152-A153.

Petitioners also engaged in "sidewalk counseling," in which sidewalk counselors proffer literature to women entering health care facilities and try to convince them not to have abortions. Pet. App. A147-A149. Sidewalk counselors would crowd patients, walking as close to the person as possible, sometimes making physical contact with them. *Id.* at A148; Tr. 55, 275. The counselors also sometimes went beyond attempts at mere persuasion and harassed and intimidated patients and escorts. Pet. App. A148. Such harassment included physically interfering with the free movement of persons approaching or leaving the clinic, surrounding such persons, making it "very difficult sometimes for them to even walk," or "pushing, shoving, [or] grabbing" them. Tr. 174, 263-264, 271, 276, 280-282, 290-293, 303, 397; see also Tr. 272-274, 293-294, 339. When a patient arrived in a car, counselors would try to stop the car, hang onto it, chase it, scream in the windows, and impede its progress. Tr. 172-173, 290, 355-356. When a person who was targeted by sidewalk counseling expressed a desire to be left alone, the counselors usually would not leave them alone, Pet. App. A148, and would continue to pursue the person to the clinic door, sometimes through a lobby and into and up an elevator. Tr. 56, 58-63, 209-212, 215, 263, 270-271, 275-276, 295; see Pet. App. A148. Other demonstrators sometimes joined the counselors as they followed the person seeking access to the clinic, so that by the time the person reached the entrance,

the person sometimes had "as many as six to ten people around her." Tr. 276. Counselors would yell and scream at the persons entering the clinic. Tr. 175-176, 276, 357-358.

b. In the fall of 1990, petitioners announced that they were going to conduct a full-scale blockade at an undisclosed clinic in western New York State on September 28, 1990. Pet. App. A142.[3] On September 24, 1990, respondents filed the instant suit. After hearing and argument, the district court entered a temporary restraining order (TRO) that precluded petitioners from: (a) "trespassing on, sitting in, blocking, impeding or obstructing access to, ingress into or egress from any facility at which abortions are performed in the Western District of New York, including demonstrating within 15 feet of any person seeking access to or leaving such facilities," except that sidewalk counseling of an individual, by not more than two persons, was allowed so long as it consisted of a conversation "of a nonthreatening nature"; (b) "physically abusing or tortiously harassing persons entering or leaving, working at or using any services at any facility at which abortions are performed," except that the same type of sidewalk counseling was allowed; and (c) "making any excessively loud sound which disturbs, injures, or endangers the health or safety of any patient or employee of a health care facility where abortions are performed in the Western District of New York." J.A. 23-24. The TRO specified that, in the event a person who is the object of counseling wants not to have counseling, or wants to leave

[3] Respondents also alleged that petitioners intended to engage in "rescues" at clinics in the area during October of 1990, which petitioners had deemed National Rescue Month. J.A. 33-34. As petitioners note, "rescues" commonly consist of sit-ins or blockades. Pet. Br. 3 n.3.

or to walk away, the counselors "shall cease and desist from such counseling of that person." *Ibid.*

Following issuance of the TRO, petitioners did not conduct the blockade announced for September 28, 1990, and instead engaged in a non-obstructive, peaceful demonstration. Pet. App. A143. With petitioners' consent, the court ordered that the TRO remain in effect until the motion for a preliminary injunction was decided. *Ibid.* Within approximately a month of the issuance of the TRO, petitioners reverted to obstructive and harassing conduct. Although petitioners suspended full-scale blockades until after resolution of the preliminary hearing motion (see note 12, *infra*), they meanwhile resumed demonstrating in a manner that blocked the clinics' driveway entrances, including demonstrators again physically pressing their bodies against vehicles. Tr. 64-66, 92-94, 102-103, 107-108, 347-348, 540-541, 620-621. Petitioners again engaged in sidewalk counseling that included chasing cars in the parking lot, Tr. 66, 156, screaming at patients, Tr. 356-357, and surrounding patients and refusing to let them proceed unimpeded. Tr. 209-210, 214-216, 271-272, 283-286, 295. Petitioners did not obey the TRO's requirement that they approach in groups no larger than two and that they move 15 feet away if the counselee requested. Tr. 99, 176-178, 209-212.[4]

Respondents filed motions for civil contempt against several of the defendants. Pet. App. A143-A144. The district court ultimately held several defendants in civil contempt for having violated the TRO. J.A. 79-101, 102-120, 121-149.

[4] For discussion of other conduct by petitioners that violated the TRO and occurred prior to the hearing on the preliminary injunction, see Tr. 62, 102-103, 181-183, 209-210, 278, 284-285, 295, 347-348, 983, 1007.

c. The district court conducted a hearing on the motion for a preliminary injunction over the course of several days between March 6 and April 1, 1991. Pet. App. A139. The court also considered evidence introduced at the contempt hearings in making a determination on the preliminary injunction. *Id.* at A140. On February 14, 1992, the district court issued a detailed opinion and entered a preliminary injunction. *Id.* at A138-A186.[5] The court found, *inter alia*, that: "[t]he presence of numerous demonstrators in the driveway entrances intimidates and impedes the drivers of cars seeking access to the parking lots of the facilities and creates a danger to both the occupants of the cars and the demonstrators themselves," *id.* at A147; "[t]he demonstrators also crowd around people trying to enter the facilities in an intimidating and obstructing manner, and grab, push and shove the patients, patient escorts and staff. This activity causes stress and sometimes even physical injury to the patients, patient escorts and medical staff, and disrupts the atmosphere necessary for rendering safe and efficacious health care," *ibid.*; and the purportedly peaceful sidewalk counseling "often erupts into a charged encounter" and counselors "turn to harassing, badgering, intimidating, and yelling at the patients and patient escorts," and "often crowd around patients," *id.* at A148-A149. The court also noted that "[m]any of the 'sidewalk counselors' and other defendants have been arrested on more than one occasion for harassment, yet persist in harassing and intimidating patients, patient escorts and medical staff." *Id.* at A149.

---

[5] Petitioners stipulated that the court could enjoin full-scale, physical blockades (see Pet. App. A134-A135). The court's findings, therefore, focused on other demonstrations and sidewalk counseling that obstructed or impeded physical access. *Id.* at A146 n.5.

The court made numerous findings regarding the adverse health effects of petitioners' obstructive, intimidating and harassing conduct on women seeking abortion services at respondents' clinics. See Pet. App. A87, A152-A153. The court also found that local law enforcement efforts had been shown to be inadequate to respond effectively to the blocked access, harassment and intimidation. *Id.* at A151-A152.

Based on this record, the court concluded that "[t]he irreparable harm flowing [from] defendants' 'rescue' activities, including the medical risks and the denial of constitutionally guaranteed rights, is real and threatens to continue. Without some form of injunctive relief, prospective patients will suffer irreparable harm from delayed access to clinics." Pet. App. A156. The court determined that an injunction was necessary to serve the important government interests in: "safeguarding health"; "maintaining medical standards as regards the performing of abortions"; ensuring that abortions are safe for the patient; ensuring public safety by preventing petitioners "from blocking traffic entering and leaving the clinics" and by prohibiting petitioners from "abusing, grabbing, touching, pushing, shoving, or crowding persons entering or leaving the clinics"; and ensuring that the constitutional rights of those on both sides of the dispute are protected. *Id.* at A167. The court concluded that respondents had demonstrated a likelihood of success on the merits of their federal claim and two of their state claims, without addressing respondents' additional state claims. *Id.* at A156-A164 & n.11.

The court issued a preliminary injunction, prohibiting petitioners, and those acting in concert with them, from (a) "trespassing on, sitting in, blocking, impeding, or obstructing access to, ingress into or egress from any facility," including the parking lots of, and other en-

trances to, facilities at which abortions are performed in the Western District of New York; (b) demonstrating within 15 feet of doorway entrances, parking lot entrances, and driveway entrances of such facilities, or within 15 feet of any person or vehicle seeking access to or leaving such facilities, except that sidewalk counseling "of a non-threatening nature" is allowed, if conducted by not more than two persons; (c) "physically abusing, grabbing, touching, pushing, shoving, or crowding persons entering or leaving, working at or using any services at any facility at which abortions are performed," except that the same type of sidewalk counseling is allowed; (d) making excessively loud noise that injures, disturbs, or endangers the health or safety of a patient or employee of a clinic; and (e) assisting another in taking any of the prohibited actions. Pet. App. A183-A185. The court also provided, as it had in the TRO, that, in the event a person who is the object of sidewalk counseling wants not to have counseling, or wants to leave or to walk away, the counselors must "cease and desist from such counseling" and thereafter be bound by the 15-foot limitation. *Id.* at A184.

The court specified that the 15-foot areas, which it labeled "clear zones," were "necessary to ensure that people and vehicles seeking access to the clinics will not be impeded, and will be able to determine readily where the entrances are located. Further, the 'clear zones' will prevent defendants from crowding patients and invading their personal space." Pet. App. A170.

The district court emphasized that sidewalk counseling was permitted within the 15-foot areas, subject to the requirement that counselors withdraw to a distance of 15 feet at the counselee's request. Pet. App. A170. The court explained that this provision was "necessary in order to protect the right of people approaching and entering the facilities to be left alone." *Id.* at A171, citing *Rowan* v.

United States Post Office Dept., 397 U.S. 728, 736 (1970) ("the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate"); 397 U.S. at 738 ("no one has a right to press even 'good' ideas on an unwilling recipient"). The court acknowledged that the unwilling listeners in this case were on a public sidewalk or street where a person generally can avoid unwanted speech by averting their eyes or walking away. Pet. App. A173. The court found, however, that, in light of petitioners' aggressive conduct, persons seeking access to respondents' clinics have been unable to avoid petitioners' speech because averting their eyes or covering their ears is inadequate, and walking away unimpeded is not possible. *Id.* at A173-A174.

The court reaffirmed that, notwithstanding the injunction, petitioners still are able to demonstrate "in full view of people going into the clinics or just passing by." Pet. App. A176. And, with regard to the individuals entering the clinics, petitioners may approach and counsel, subject to moving away 15 feet if so requested. Petitioners, however, still can address such individuals from that distance. *Ibid.*[6]

---

[6] While an appeal from the issuance of the injunction was pending in the court of appeals, this Court decided *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263 (1993). In *Bray*, the Court held that, in order to make out a Section 1985(3) claim, a plaintiff must make a showing of an invidiously discriminatory, class-based animus underlying the interference with protected rights, and that plaintiffs could not make out such a claim against abortion demonstrators based merely on their opposition to abortion because that opposition does not equate with an animus against women as a class. In light of that ruling, petitioners moved for dismissal of the case. The district court dismissed the Section 1985(3) claim, but retained jurisdiction over the remaining state law claims and refused to vacate the preliminary injunction. *Pro-Choice Network* v. *Project Rescue*, 828 F. Supp. 1018 (W.D.N.Y. 1993); Pet. App. A15. Petitioners' appeal from this order

2. A panel of the court of appeals upheld the validity of the district court injunction except with respect to the 15-foot clear zone and the provision requiring sidewalk counselors to withdraw to a distance of 15 feet. Pet. App. A80-A109.[7] The panel held that the government interests in the safe performance of abortions, public safety, and protection of the parties' constitutional rights were "quite sufficient to justify an appropriately tailored injunction to protect them." *Id.* at A99, quoting *Madsen*, 114 S. Ct. at 2526. The panel concluded that, based on the record before the district court at the time it issued the preliminary injunction, the 15-foot restrictions and the requirement that sidewalk counselors move 15 feet away, at the request of a counselee, burdened more speech than necessary. Pet. App. A102, A104.

The court of appeals granted rehearing in banc, limited to whether the court of appeals erred in invalidating those two provisions of the injunction. Pet. App. A16. The in banc court vacated the portion of the panel opinion striking down the two provisions and affirmed the validity of the provisions, as modified, because they do not burden more speech than necessary to serve several significant government interests. *Id.* at A1-A78.

In his opinion for the court, Judge Oakes agreed with the panel regarding the significant government interests that are served by the injunction (ensuring safety of medical procedures, public safety, and access to abortions), and agreed that those interests are sufficient to justify an

---

was considered by the court of appeals, together with the appeal from the issuance of the preliminary injunction, and was rejected. *Id.* at A83, A90.

[7] The court of appeals rejected, as either meritless or improperly preserved, numerous other arguments. See Pet. App. A91-A93, A105-A108.

injunction appropriately tailored to protect them. Pet. App. A18-A19. The in banc court concluded that the 15-foot zones were no broader than necessary to protect the health and well-being of patients, in light of the record in this case. It emphasized the health care functions of the facilities involved, the extensive record of petitioners' harassment and intimidation of patients and the adverse medical consequences of that conduct, the adverse medical consequences that result from delays in receiving treatments related to abortions, the limited size of the 15-foot area, which enables petitioners to continue to "picket, carry signs, pray, sing or chant in full view of people going into the clinic or just passing by," and the ability of petitioners to attempt to engage in sidewalk counseling. *Id.* at A23-A26. The court concluded that the "injunction does not hamper [petitioners'] message, only [their] intimidating method of demonstration." *Id.* at A25.

The in banc court also upheld the provision that permits individuals to refuse counseling within 15 feet, Pet. App. A26-A33, emphasizing that the purpose of the provision is not, as petitioners suggest, "to suppress speech because of the anxiety its content produces in its audiences, * * * but rather to provide a vulnerable group of medical patients with some relief from the duress caused by unwelcome physical proximity to an extremely vocal group of demonstrators"—"it is the demonstrators' physical proximity which is regulated rather than their message." *Id.* at A30 (citations omitted); see also Tr. 301.[8] The court

---

[8] The court ordered that the district court, on remand, clarify in the injunction that, in order for a person being counseled to cause counselors to move away 15 feet, the person must verbally or nonverbally indicate her unwillingness to be counseled. Pet. App. A29. The court pointed out that, to the extent petitioners contend that other aspects of the injunction may need clarification, those matters are addressable by the district court upon petitioners' motion. *Id.* at A30 & n.5.

affirmed the district court's finding that the provision requiring counselors to move away 15 feet was necessary, not only to protect the right of access to abortions, but to provide persons seeking access to the clinics the ability to walk away from the unwanted speech which, otherwise, would not be possible because of petitioners' invasive conduct. *Id.* at A31-A32.

In a concurring opinion, also joined by a majority of the court, Judge Winter concluded that the challenged provisions should be upheld because "the First Amendment does not, in any context, protect coercive or obstructionist conduct that intimidates or physically prevents individuals from going about ordinary affairs." Pet. App. A37-A45. Judge Jacobs filed a concurring opinion in which he stressed that the injunction was justified by the government interests in public safety, the free flow of traffic on public sidewalks, and property rights. *Id.* at A46-A48. Judge Meskill, the author of the original panel opinion, filed a dissenting opinion, disagreeing with how the court applied the *Madsen* standard to the facts of this case. *Id.* at A48-A72. Judge Altimari, the other member of the original panel majority, also filed a dissenting opinion indicating his agreement with the panel's initial conclusion. *Id.* at A72-A78.

SUMMARY OF ARGUMENT

The trial court's preliminary injunction is consistent with the First Amendment because it serves significant government interests and burdens no more speech than necessary in order to serve those interests. *Madsen* v. *Women's Health Center, Inc.*, 114 S. Ct. 2516, 2525 (1994). The injunction was entered in response to petitioners' record of unlawful obstructive, intimidating, and harassing conduct at respondents' reproductive health facilities, including full-scale blockades that had shut down targeted

facilities, as well as conduct that obstructed the pathways to respondents' facilities, and crowded, harassed, intimidated and surrounded persons and vehicles seeking access to the facilities. The preliminary injunction serves the significant government interests in prohibiting conduct that interferes with patient access to health care providers and that disrupts public safety.

Neither of the challenged provisions burdens more speech than necessary in order to serve the significant government interests. One provision states that petitioners, and others acting in concert with them, may not demonstrate within 15 feet of entrances to the medical facilities, or within 15 feet of persons and vehicles seeking access to or leaving such facilities, except that they may engage in sidewalk counseling, *i.e.*, nonthreatening conversation by no more than two people with persons entering or leaving a facility. The first of these restrictions is necessary to ensure access to the clinics; the second is necessary to enable people to determine the location of the clinic entrances and to reach those entrances. These two restrictions respond to petitioners' previous obstructive, intimidating, and harassing conduct —conduct that had continued after entry of a TRO. It is important to note that the injunction permits petitioners to continue to conduct demonstrations within the hearing and sight of all persons entering, leaving or passing by the clinics. The 15-foot clear zone is less than half of the size of the 36-foot zone upheld by the Court in *Madsen*, does not exclude all speech, and was fashioned with the problems of vehicular traffic and the need for visibility of clinic entrances in mind.

The other challenged injunction provision requires that, in the event that a person who is the object of close-up sidewalk counseling expresses a desire to end the encounter, the counselors must move at least 15 feet away.

This provision is necessary to further the government's interest in preventing face-to-face encounters from escalating into incidents, such as those reflected in the record, in which sidewalk counselors surrounded persons seeking access to the clinics in an intimidating and obstructive manner, and grabbed, pushed and shoved them. The provision also serves the government's interest in ensuring that the persons seeking access to the clinic have the physical ability to walk away from unwanted speech. The provision does not prohibit petitioners from approaching and initiating counseling. Moreover, even when a counselee requests that the counselors move away, counselors may continue to communicate from a distance that is within the hearing of the counselee. Requiring withdrawal to a distance of 15 feet after an individual request is much less burdensome than the no-approach zone struck down in *Madsen*, which precluded protesters from approaching persons seeking access to the clinic absent an affirmative request from that person, and which extended to a distance of 300 feet from the clinic involved in that case.

ARGUMENT

The validity of the preliminary injunction in this case is determined by the standard set forth by the Court in *Madsen* v. *Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994). In *Madsen*, the Court concluded that content-neutral injunctions affecting speech in traditional public fora, such as the injunction at issue here, present First Amendment concerns distinct from those raised by legislatively imposed restrictions on the time, place, and manner of speech. See *id.* at 2524-2526. Because injunctions are imposed by a particular court and directed at the conduct of identified individuals, they "carry greater risks of * * * discriminatory application than do general

ordinances." *Id.* at 2524. At the same time, however, the Court recognized that injunctions can be better tailored by a court to afford more precise relief than can a generally applicable statute. *Ibid.*; see also *Chicago Teachers Union, Local No. 1* v. *Hudson*, 475 U.S. 292, 309-310 n.22 (1986) ("The judicial remedy for a proven violation of law will often include commands that the law does not impose on the community at large.").

Because of these differences, the Court held that the "standard time, place, and manner analysis is not sufficiently rigorous" to evaluate the constitutionality of a content-neutral injunction in a public forum, but that the strict scrutiny applied to content-based restrictions also is inappropriate. See *Madsen*, 114 S. Ct. at 2525-2526. The Court held that a court "must ask instead whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." *Id.* at 2525. The court of appeals correctly held that the challenged injunction provisions in this case satisfy that standard.[9]

---

[9] At times, petitioners appear to treat Judge Winter's opinion, concurring in the result, as if it is the opinion for the in banc court of appeals. See, *e.g.*, Pet. Br. 14; Pet. 8-9; see also Br. of Amicus AFL-CIO 3-4, 13-30. Petitioners correctly point out that more members of the court joined Judge Winter's concurring opinion than joined Judge Oakes' opinion for the court. Pet. Br. 13. Judge Oakes' opinion for a majority of the in banc court of appeals, however, constitutes the judgment subject to review by this Court. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) (the Court "reviews judgments, not opinions"). The reasoning of that opinion is fully sufficient to support the court of appeals' judgment. Accordingly, we address our arguments to that judgment and opinion.

THE CHALLENGED PROVISIONS OF THE PRELIMINARY INJUNCTION SERVE SIGNIFICANT GOVERNMENT INTERESTS AND BURDEN NO MORE SPEECH THAN NECESSARY

A. The Prohibition Against Petitioners Demonstrating Within 15 Feet Of Clinic Entrances, Or Within 15 Feet Of Vehicles And Persons Seeking Access To Or Leaving The Clinics, Furthers Significant Government Interests

1. The district court crafted its preliminary injunction in response to the ongoing obstructive, intimidating, and harassing conduct of petitioners. Before the issuance of the TRO in this case, petitioners had conducted full-scale, physical blockades that had essentially shut down several of respondents' health care facilities. See Pet. App. A146. Petitioners' blockade planned for September 28, 1990, "failed to take place only because the district court issued its TRO enjoining the blockade on the day before it was scheduled to occur." Pet. App. A22.

Even after the TRO, petitioners temporarily suspended only their full-scale blockades and continued to engage in other types of demonstrations that interfered with access to the clinics in violation of the TRO. See page 7 and note 4, *supra*. Several of the defendants were held in contempt for violating the TRO. See page 7, *supra*. The district court specifically found that petitioners had not been deterred by the threat of arrest and conviction under state law, even though many of them had been arrested for unlawful harassment "on more than one occasion." Pet. App. A149, see also A151. Petitioners' demonstrations, both before and after issuance of the TRO, included many of the same types of obstructive conduct that formed the basis for the injunction in *Madsen*, including demonstrators standing in clinic doorways and driveways and

sidewalk counselors crowding and surrounding would-be clinic patients.

2. In light of this record, the courts below correctly found that injunctive relief was necessary to protect "several significant government interests." Pet. App. A167.[10] The interests include: "safeguarding health," "maintaining medical standards as regards the performing of abortions," ensuring the protection of the constitutional rights of both parties, including access to abortions, and ensuring public safety and the free flow of traffic. *Ibid.*; *id.* at A18-A19, A46-A48. See *Madsen*, 114 S. Ct. at 2526 (government's interests in "protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy," "ensuring the public safety and order, * * * promoting the free flow of traffic on public streets and sidewalks," protecting property rights, and

[10] Petitioners contend (Pet. Br. 15-16, 31-34) that the preliminary injunction was not necessary to serve any significant government interest because respondents' claim under 42 U.S.C. 1985(3) was dismissed by the court in light of *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), see note 6, *supra*, and the remaining state law claims (trespass and state civil rights statute) do not support the relief granted. Petitioners do not present this issue in their petition as a ground for reversing the court of appeals, see Pet. i-ii, and the question was not addressed by the court of appeals because it presented a question of state law that had not been raised in the district court. Pet. App. A94-A95. In the court of appeals' view, "the district court should have the first opportunity to determine, on proper application of the parties, both whether the injunction exceeds its state law basis and whether, if so, other state law or federal law bases exist for this injunction." *Id.* at A94; see also *id.* at A16 (en banc opinion agreeing with panel). We agree, and for those reasons, believe that the issue is not properly before this Court. See *Yee* v. *City of Escondido*, 503 U.S. 519, 533-538 (1992); *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 645-646 (1992). Moreover, respondents correctly suggest that it would be appropriate for the Court to dismiss the writ as improvidently granted rather than rule on this issue. See Resp. Br. 47-48.

preserving the medical privacy of patients, were found to be "quite sufficient to justify an appropriately tailored injunction to protect them").[11]

The significance of the government's interest in ensuring access to reproductive health care, including abortion services, is further evidenced by Congress's recent enactment of the Freedom of Access to Clinic Entrances Act of 1994 (Access Act), Pub. L. No. 103-259, 198 Stat. 694, 18 U.S.C. 248. In order to protect the government's interests in ensuring safe and unobstructed access to abortion services, in light of a history of obstructive and intimidating conduct aimed at interfering with such access, Congress enacted the Access Act to provide criminal and civil sanctions against anyone who "by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services." 18 U.S.C. 248(a)(1). The Attorney General, state Attorneys General, and individual persons aggrieved by violations of the Act, are authorized to bring civil actions under the Act to obtain relief, including "temporary, preliminary or permanent injunctive relief." 18 U.S.C. 248(c)(1), (2) and (3).

It is clearly established that ensuring public safety at health care facilities is a legitimate state objective. See

---

[11] Petitioners contend (Pet. Br. 22-26) that the challenged portions of the injunction here constitute an unlawful prior restraint. The court of appeals correctly held (Pet. App. A95-A98) that this Court's reasoning in *Madsen* rejects that argument because the injunction here is content-neutral and restricts, but does not ban, particular expression. *Id.* at A95 n.5, citing *Madsen*, 114 S. Ct. at 2524 n.2.

NLRB v. *Baptist Hospital, Inc.*, 442 U.S. 773 (1979) (upholding prohibition on labor soliciting in areas of hospital associated with patient care); *Roe* v. *Wade*, 410 U.S. 113, 150 (1973) (State has an interest in seeing that "abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient"); *Medlin* v. *Palmer*, 874 F.2d 1085 (5th Cir. 1989) (upholding local ordinance forbidding operation of loudspeaker or sound amplifier within 150 feet of, *inter alia*, any hospital, nursing home, or facility that provides surgical services on an outpatient basis).

The government's interest in ensuring the free flow of traffic on streets and sidewalks, access to buildings, and protection of property rights also justifies regulation of petitioners' demonstrations. See *Heffron* v. *ISKCON*, 452 U.S. 640, 650 (1981) ("State's interest in protecting the 'safety and convenience' of those using a public forum is a valid governmental objective"); *Cameron* v. *Johnson*, 390 U.S. 611, 616 (1968) (upholding statute that prohibited picketing "in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from" county courthouses); *Cox* v. *Louisiana*, 379 U.S. 536, 555 (1965) ("A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations."); *Cox* v. *New Hampshire*, 312 U.S. 569, 574 (1941) ("The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend."); *Schneider* v. *State*, 308 U.S. 147, 160 (1939) ("[m]unicipal authorities * * * have the duty to keep their communities' streets open and available for movement of persons and property,

the primary purpose to which the streets are dedicated"); *Ibid.* ("group of [leaflet] distributors could not insist upon a constitutional right to form a cordon across a street and to allow no pedestrian to pass who did not accept a tendered leaflet").

In determining whether injunctive relief is necessary to meet the government's interest in ensuring unobstructed access to health care facilities that have been obstructed by particular defendants in the past, a court is entitled to draw inferences about the future conduct of those defendants, based on their past conduct. See *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287, 295 (1941) (recognizing that, in framing an injunction against picketing, court may "base protection against future coercion on an inference of the continuing threat of past misconduct"). Accordingly, the district court here was entitled to take into account the nature of petitioners' past unlawful actions in "fashion[ing] appropriate restraints on the [defendants'] future activities * * * to avoid a recurrence of the violation." *National Soc'y of Professional Engineers* v. *United States*, 435 U.S. 679, 697 (1978).[12]

---

[12] Indeed, the district court's "inference of the continuing threat of [defendants'] past misconduct," *Milk Wagon Drivers Union*, 312 U.S. at 295, was proven accurate. Although petitioners suspended full-scale blockades after the TRO and pending the preliminary injunction hearing, see Pet. App. A146 n.5, they resumed blockades after the issuance of the preliminary injunction, in violation of the injunction. See *In re Slovenec*, 799 F. Supp. 1441, 1446 (W.D.N.Y. 1992) (district court appointing special prosecutor to pursue criminal charges against certain defendants who were among approximately 75 other uncharged persons who violated the preliminary injunction against blockades during Spring of Life on April 24, 1992); see also *Pro-Choice Network* v. *Project Rescue*, 828 F. Supp. 1018, 1029 (W.D.N.Y. 1993) (discussing charges of criminal contempt against various defendants for violating preliminary injunction on April 17, 24, and May 1, 15, 1993). In upholding the injunction, however, the court of appeals limited its consideration to the record facts before the district court at the time of the issuance of the preliminary injunction. Pet. App. A17 n.3; see also *id.* at A101 n.6.

Given the history of petitioners' conduct, the district court correctly concluded that the limitations on demonstrations within 15 feet of the entrances to respondents' clinics, and their parking lots and driveways, and within 15 feet of people and vehicles seeking access to and leaving the clinics, were necessary to guard against obstruction, intimidation and harassment, and to ensure access to the clinics, the safe performance of abortions, and the protection of patients' health. See Pet. App. A23-A24. Cf. *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949) (noting that "[d]ecrees of * * * generality are often necessary to prevent further violations where a proclivity for unlawful conduct has been shown"). The district court specifically noted that the 15-foot limitation on demonstrations was necessary to secure unfettered access to the clinics and to ensure that people and vehicles seeking access "be able to determine readily where the entrances are located." Pet. App. A170. See, *e.g.*, Tr. 187-188, 344, 353 (because of demonstrators standing across the driveways, some women seeking access to the clinics could not find the clinics); Tr. 191, 221 (some drivers who found the facilities "could not get in" because the demonstrators stood in their way).[13]

---

[13] Petitioners contend (Pet. Br. 17, 47-48) that the preliminary injunction provision is unconstitutionally vague because they "cannot know with any certainty what the term 'demonstrating' includes." Petitioners did not raise this issue below and it, therefore, is not fairly included in the questions presented in the petition for certiorari and should not be considered by the Court. See note 10, *supra*. In any event, the term "demonstrating" is so common that "person[s] of ordinary intelligence" can reasonably know what it prohibits. See

B. The Prohibition Against Petitioners Demonstrating Within 15 Feet Of Clinic Entrances, Or Within 15 Feet Of Vehicles And Persons Seeking Access To Or Leaving The Clinics, Burdens No More Speech Than Necessary

1. The preliminary injunction does not establish "speech-free zones," as petitioners suggest (Pet. Br. 45). The provision prohibiting demonstrations within 15 feet of clinic entrances, and within 15 feet of persons and vehicles seeking access to or leaving clinics, does not ban any speech. Instead, the provision limits the manner in which petitioners may speak while standing in that area to sidewalk counseling, with no restrictions whatever on the content of the speech, so long as it is nonthreatening. The provision thus permits "direct one-on-one communication," an important avenue of political discourse, *Meyer* v. *Grant*, 486 U.S. 414, 424 (1988), and one of petitioners' most common methods of communicating. Although petitioners may be required to adjust the proximity of their sidewalk counseling when the counselee requests that they move away, this provision imposes far less of a burden than the injunction provision upheld in *Madsen*, which imposed a 36-foot zone around clinic entrances that no protester could enter. 114 S. Ct. at 2526. Permitting unsolicited sidewalk counseling within the 15-foot area supports the conclusion of the court of appeals that the provision does not burden more speech than necessary.

Grayned v. *City of Rockford*, 408 U.S. 104, 108 (1972); see also *Madsen*, 114 S. Ct. at 2526-2527 (upholding buffer zone restriction on "demonstrating"). Finally, in this case, the context in which the injunction was issued provides ample means of defining the term. See, *e.g.* Pet. Br. 3-4 & n.3 (discussing district court's detailed description of the various types of demonstrations at issue in this case); Pet. App. A145-A151.

See *ibid.*, quoting *Carroll* v. *President & Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968) (restrictions "'couched in the narrowest terms that will accomplish the pin-pointed objective' of the injunction").[14]

2. With regard to demonstrations that are prohibited within the 15-foot area, the injunction does not ban that speech either, but simply moves it to a distance of 15 feet — a distance that leaves petitioners well within the hearing and sight of the average person. The provision does not preclude petitioners from making their message known to any of the persons seeking access to or leaving respondents' clinics.

Contrary to petitioners' contention (Pet. Br. 48), the 15-foot limitation on demonstrations is directly related to the government's interest in ensuring unimpeded access to the health care facilities. The district court chose 15 feet

---

[14] As the court of appeals observed, the injunction here is in some ways narrower and in some ways broader than the buffer zone provision in *Madsen*. Pet. App. A21. The area here (15 feet) is substantially smaller than that in *Madsen* (36 feet), and sidewalk counseling is permitted here, whereas the *Madsen* zone excluded all protesters, even if a person indicated a willingness to speak with them. The area here is broader to the extent it applies around people and vehicles seeking access to and leaving the clinics. Petitioners contend (Pet. Br. 49) that there is no way to know where the injunction applies because they do not know who is a person seeking access to, or leaving, a facility, as opposed to who is a passer-by. To the extent petitioners have a genuine concern about this question, such a matter is a proper subject of a motion for clarification in the district court, as the court of appeals pointed out (in response to petitioners' raising this issue at oral argument). Pet. App. A25 n.4 (refusing to address issue of "how far from a clinic a floating buffer zone may reach to protect a person 'seeking access to or leaving' the clinic. This is exactly the type of issue that is best left to case-by-case adjudication by the district court. We are confident that the district court will apply a reasonable geographic scope to the phrase 'seeking access to or leaving.'").

as the required distance because that was the space necessary to "allow an automobile to pass freely." Sept. 27, 1990, TRO Hearing, Tr. 36. The court had before it a variety of evidence about the physical characteristics of respondents' facilities, including photographs, diagrams, and testimony regarding how petitioners' conduct interacted with these geographic factors to obstruct access. See Tr. 23-49, 182-183, 185, 189, 202-204, 257-262, 462, 466-468, 877-879, 966-968, 984, 989, 1004, 1012, 1014, 1049-1052. Petitioners had engaged in obstructive, intimidating, and harassing conduct that had included crowding and surrounding potential patients on the walkways and roadways leading up to clinic entrances, as well as in the immediate vicinity of the entrances. See pages 4-7, *supra*. The 15-foot areas created by the injunction are tailored to the objectives of preventing petitioners from resuming this past conduct. The court's determination warrants deference in this regard. As the Court recognized in *Madsen*, "some deference must be given to the [trial] court's familiarity with the facts and the background of the dispute between the parties even under [the Court's] heightened review." 114 S. Ct. at 2527.[15]

[15] The 15-foot restrictions do not require demonstrators to "flee from approaching pedestrians on pain of contempt," as petitioners claim (Pet. Br. 48-49). All that is precluded in that area are demonstrations other than sidewalk counseling. Petitioners could not be found in contempt simply for standing, in a non-obstructive manner, within that area. Moreover, the court of appeals pointed out that the scenarios posed by petitioners had not occurred and, if they did occur, petitioners could move the district court for any necessary clarification of the injunction. Pet. App. A30 n.5. See note 14, *supra*.

C. The Provision Requiring That Sidewalk Counselors Move Away From A Person, To A Distance Of 15 Feet, If The Person So Requests, Does Not Burden More Speech Than Necessary

It is well established that "in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate "breathing space" to the freedoms protected by the First Amendment.'" *Boos* v. *Barry*, 485 U.S. 312, 322 (1988), quoting *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46, 56 (1988). At the same time, the Court has long recognized an individual's right to walk away from, or otherwise reject, speech that he or she does not want to receive. See, *e.g.*, *Rowan* v. *United States Post Office Dep't*, 397 U.S. 728, 736, 738 (1970) (right "to be left alone"; "no one has a right to press even 'good' ideas on an unwilling recipient"); *Kovacs* v. *Cooper*, 336 U.S. 77, 86-87 (1949) (plurality opinion) (visitor cannot "insert a foot in the door and insist on a hearing"; passer-by may be "offered a pamphlet in the street but cannot be made to take it"); *Schneider* v. *State*, 308 U.S. 147, 162 (1939) (person has right to distribute literature "to one willing to receive it"). Normally, the burden of rejecting speech falls on the particular individual to avert his or her eyes or walk away. *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 210-211 (1975), citing *Cohen* v. *California*, 403 U.S. 15, 21 (1971). The solution generally is not to silence the speaker, even where the speaker's message or manner would be repugnant to many or most people. See, *e.g.*, *Texas* v. *Johnson*, 491 U.S. 397, 408-409 (1989); *Cohen*, 403 U.S. at 21.

In this case, the district court found that, as a practical matter, persons seeking access to respondents' clinics have been unable to walk away from petitioners' speech because of petitioners' tactics that include surrounding

persons approaching the clinic, as well as sometimes grabbing, touching and shoving them. See Pet. App. A173-A174. In light of this record, the district court imposed limitations on the manner in which petitioners could conduct sidewalk counseling at close range. These limitations also were necessary because the court had found that sidewalk counselors often had "harass[ed], badger[ed], intimidat[ed] and yell[ed] at the patients," and that "[t]hey continue[d] to do so even after the patients signal[led] their desire to be left alone." *Id.* at A148. The Court has recognized that such face-to-face encounters between people in close proximity to one another raise unique risks of duress, harassment, and obstruction. *Madsen*, 114 S. Ct. at 2527; see also *ISKCON* v. *Lee*, 505 U.S. 672, 684 (1992) (noting that "face-to-face solicitation presents risks of duress that are an appropriate target of regulation"); Note, *Too Close For Comfort: Protesting Outside Medical Facilities*, 101 Harv. L. Rev. 1856, 1858 n.14 (1988) (discussing social science research "documenting the existence of 'personal space'—an emotionally charged zone surrounding each individual that regulates one's social and physical interactions with others"); *cf. Madsen*, 114 S. Ct. at 2526 (acknowledging that "targeted picketing of a hospital or clinic threatens not only the psychological, but the physical well-being of the patient held 'captive' by medical circumstances"). The court therefore required that, in the event a person seeking access to or leaving respondents' clinics expresses a desire not to be counseled, to leave, or to walk away, sidewalk counselors must move at least 15 feet away.

This provision does not, as petitioners contend, "outlaw" all "disinvited communications" (Pet. Br. 35, 36), constitute an "audience veto on speech" (*id.* at 38-39), or an unlawful licensing scheme (*id.* at 39-40). The provision merely enables the counselee to walk away from face-to-face contact; it does not silence any speech— "Once outside this zone, the 'counselor' * * * may continue advocating his or her beliefs to the woman who has refused them, albeit now from a distance of fifteen feet." Pet. App. A29. The provision does not prevent petitioners from expressing their ideas and messages either to the world at large, or to people seeking access to respondents' facilities.

The provision requiring sidewalk counselors to withdraw to a distance of at least 15 feet, after being requested to do so, is not "virtually identical" to the 300-foot no-approach zone struck down in *Madsen*, as petitioners contend. Pet. Br. 34. In *Madsen*, the injunction provided that, within 300 feet of the clinic, the protesters were required to "refrain from physically approaching any person seeking services of the clinic 'unless such person indicates a desire to communicate,' " by approaching or by inquiring of the defendants. *Madsen*, 114 S. Ct. at 2529. In addition, even if a person expressed a desire to communicate with the protesters there, the protesters could "in no event" come within 36 feet of the clinic. Here, unlike in *Madsen*, the sidewalk counselors are completely free to approach any person and initiate sidewalk counseling. Moreover, even after a person expresses a desire to not receive the counselors' message, the counselors must move away only to a distance of 15 feet, less than half the width of the buffer zone upheld in *Madsen*, a zone that applied even to persons who expressed an interest in receiving the protesters' speech.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
DEVAL L. PATRICK
Assistant Attorney General
PAUL BENDER
Deputy Solicitor General
BETH S. BRINKMANN
Assistant to the Solicitor General
JESSICA DUNSAY SILVER
SAMUEL R. BAGENSTOS
Attorneys

JULY 1996